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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 443

THOMAS MURPHY AND VINCENT MURPHY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED JUNE 9, 1926

(32,010)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1926

[fo.] 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3307, March Term, 1925

THOMAS MURPHY and VINCENT MURPHY, Defendants-Appellants,

vs.

UNITED STATES OF AMERICA, Complainant-Appellee

On Appeal from the District Court of the United States for the District of New Jersey

Before Buffington and Woolley, Circuit Judges, and Morris, District Judge

Certificate to the Supreme Court—Filed October 7, 1925

ORDER TO TRANSMIT QUESTION OF LAW

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and, under authority of Section 239 of the Judicial Code, certifies a question of law which arises from the following facts:

[fol. 2] STATEMENT OF FACTS

On a criminal information filed by the United States in the District Court for the District of New Jersey, charging a violation of Section 21 of Title II of the National Prohibition Act by the maintenance of a nuisance upon their premises, Thomas Murphy and Vincent Murphy were tried and acquitted. Thereafter the United States, under authority of Section 22 of Title II of the National Prohibition Act, filed a bill in equity in the same court against the same defendants, charging them upon the same facts with maintaining the same nuisance and praying that they be enjoined from using the premises as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of the Act and that the marshal be commanded to abate the nuisance by taking possession of all property used in connection therewith.

Early in the trial the defendants offered in evidence the record of their trial and acquittal in the criminal proceeding. It was admitted. At the end of the trial the defendants moved that the bill be dismissed on the ground that, as the records of the two proceedings showed identity of subjects matter and parties, the judgment of acquittal in the criminal proceeding is a bar to the civil suit, relying upon the law of United States vs. Coffey, 116 U. S. 436. The motion was opposed by the United States upon authority of United States vs. Stone, 167 U. S. 178 and Chantangco vs. Abaroa, 218 U. S. 476, and upon the reasoning of State vs. Roach, 83 Kas. 606, 112 Pac. 150, 31 L. R. A. (N. S.) 670. The court refused the motion and entered a decree abating the nuisance and enjoining the defendants from occupying or using the premises for one year. The defendants appealed.

[fol. 3] The question of law growing out of the aforegoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

QUESTION CERTIFIED

Is a judgment of acquittal on a criminal charge of maintaining a common nuisance in violation of Section 21, Title II of the National Prohibition Act a bar to a civil action brought under Section 22, Title II of the Act against the same parties to abate the same alleged nuisance?

Joseph Buffington, Circuit Judge. Victor B. Woolley, Circuit Judge. Hugh M. Morris, District Judge.

[File endorsement omitted.]

[fol. 4] Clerk's certificate to foregoing papers omitted in printing.

Endorsed on cover: File No. 32,010. U. S. Circuit Court of Appeals, Third Circuit. Term No. 443. Thomas Murphy and Vincent Murphy vs. The United States of America. (Certificate.) Filed June 9th, 1926. File No. 32,010.

FILE COPY

No. 443

In the Supreme Court of the United States

FOR THE THIRD CIRCUIT.

OCTOBER TERM, 1926

THOMAS MURPHY AND VINCENT MURPHY

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF THOMAS MURPHY AND VINCENT MURPHY

THOMAS MURPHY,
VINCENT MURPHY.
Per Se.

Trent Press, Printing, 14 North Warren Street, Trenton, N. J.

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BRIEF ON BEHALF OF THOMAS MURPHY AND VINCENT MURPHY

OPINIONS BELOW

This case comes before the Court on Certificate from the Circuit Court of Appeals for the Third Circuit. The decision of the District Court has not been reported.

JURISDICTON

Jurisdiction is conferred by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

ORDER TO TRANSMIT QUESTION OF LAW

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the

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STATEMENT OF FACTS

On a criminal information filed by the United States in the District Court for the District of New Jersey, charging a violation of Section 21 of Title II of the National Prohibition Act by the maintenance of a nuisance upon their premises, Thomas Murphy and Vincent Murphy were tried and acquitted. Thereafter, the United States, under authority of Section 22 of Title II of the National Prohibition Act, filed a bill in equity in the same court against the same defendants, charging them upon the same facts with maintaining the same nuisance and praying that they be enjoined from using the premises as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of the Act and that the marshal be commanded to abate the nuisance by taking possession of all property used in connection therewith.

Early in the trial the defendants offered in evidence the record of their trial and acquittal in the criminal proceeding. It was admitted. At the end of the trial the defendants moved that the bill be dismissed on the ground that, as the records of the two proceedings showed indentity of subjects, matter and parties, the judgment of acquittal in the criminal proceeding is a bar to the civil suit, relying upon the law of *United States* v. *Coffey*, 116 U. S. 436. The motion was opposed by the United States upon authority of *United States* v. *Stone*, 167 U. S. 178 and *Chantangco* v. *Abaroa*, 218 U. S. 476, and upon the reasoning of *State* v. *Roach*, 83 Kas. 606, 112 Pac. 150, 31 L.R.A. (N.S.) 670. The court refused the motion and entered a decree abating the nuisance and enjoining the defendants from occupying

or using the premises for one year. The defendants appealed.

The question of law growing out of the aforegoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

QUESTION CERTIFIED

Is a judgment of acquittal on a criminal charge of maintaining a common nuisance in violation of Section 21, Title II, of the National Prohibition Act, a bar to a civil action brought under Section 22, Title II of the Act, against the same parties to abate the same alleged nuisance?

JOSEPH BUFFINGTON,
Circuit Judge.
VICTOR B. WOOLEY,
Circuit Judge.
HUGH M. MORRIS,
District Judge.

POINT ONE

The question is therefore:

After a jury in the United States Court, having once found these defendants to be not guilty of certain specific charges, can the same charges and allegations again become the subject matter of another inquiry on the part of the Government against said defendants, even though the new action be a civil one.

Blakemore on Prohibition, Page 543, states:

"It is a universal view of the Federal Courts that a conviction of a person for breach of the Volstead Act is prerequisite to a forfeiture under Section 26 of this Act," and cites the following cases:

The Saxon, 269 Federal, 649.

United States v. *Slusser*, 270 Fed., 818.
United States v. *One Packard Motor Truck*, 284 Fed., 394.

However, the order of forfeiture need not be entered as a part of the convitcion, as such forfeiture and sale is ancillary and may be made subsequently. "*U. S.* v. *One Stephens Auto*, 272 Federal, 188." Thus it will be seen that a conviction must proceed a forfeiture, or no order of forfeiture may be made.

From this statement of the law it may be argued, that the Bill for Injujnction contains no prayer for a forfeiture. But let us see if the facts bear out this contention.

The Bill prays that the premises described therein be padlocked for the time required by law, while on the other hand, in a forfeiture proceeding, the owner is divested of his property and the condemned chattel reverts to the Government.

Thus, it must be concluded that the one is an absolute forfeiture, with reversion to the Government, while in the present case, the prayer, if allowed, is only limited or temporary in character and does not result in a permanent forfeiture to the Government.

Yet is not the principle the same? And do they not only differ in the amount of punishment or forfeiture? What difference does it make, in principle, whether an automobile or a still be forfeited to the United States, or his place, (a very valuable one in this case,) be padlocked for a year. Has not the Government forfeited any right of user in and to certain parts of the property for one year? Isn't he deprived of its use for a limited time at least? In view of this contention, it seems to me, especially under this statute, a conviction is pre-requisite before a forfeiture of any kind may be ordered. And it is a question whether there can be any forfeiture even though there be a conviction, where the

two transactions complained of are the same, that is, growing out of exactly the same transactions.

In case No. 15,688, *U. S.* v. *McKee.*

It was held "where the defendant was indicted, convicted and punished under Section 544 of the Revised Statute for conspiring with certain distillers to defraud the United States by the unlawful removal of distilled liquors from their distilleries, without the payment of taxes, *U. S.* v. *McKee*, (cases Nos. 15,685-15,686 and 15,687). In this present suit he was sued civilly, under Section 3296 of the Revised Statutes (15 Statutes 140) to recover the penalty of double the amount of the taxes of which the Government had been defrauded by means of said conspiracy, *the two transactions being the same*, it was held that the present suit for the penalty was barred by the judgment in the criminal case."

In this case there was a record of conviction and judgment entered on the record.

The Court in determining the case said, "In determining the sufficiency of this defense, it is necessary to ascertain clearly the nature of the offense charged in the indictment for which the defendant has been punished; for if it is the *same offense as defined by law*, for which he is now prosecuted and *is also for the same transaction*, our laws forbid that he or anyone else, shall be twice punished for the same crime or misdemeanor."

The Court further said: (26 Federal Case, Page 117) "We are, therefore, of opinion that if the *specific acts of removal on which this suit is brought are the same which are proved in the indictment the former judgment and conviction is a bar to the present action.*"

Thus it will be seen that the Court held that a person cannot be twice punished for the same offense or transaction. Certainly, then, if one has already been acquitted by the Court, he cannot be tried for the same transaction.

It will be observed that the Court said: "If it is to be for the same offense for which he is now tried and also for the same transaction, he cannot be twice punished."

Was not the same offense and same transactions charged in both the Bill for Injunction and the Information? They certainly were. The allegations in both are exactly alike.

(1) In both suits, a nuisance was alleged. In the criminal proceedings a nuisance was charged under Title 2, Section 21.

In the padlock proceedings, a nuisance was charged under Title 2, Sections 21 and 22 of an Act of Congress.

In both actions a violation or subjection was charged under Title 2, Section 21.

Can defendants be again subjected to punishment under Title 2, Sections 21 and 22, after they have already been acquitted of having violated Section 21, of this act.

It was further held in *Coffey* v. *United States* (Supreme Court Reports Book 29, page 684):

"A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of the defendants as claimant of the property involved. In a subsequent suit in rem, when, as against them, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property."

It will be noticed the Court said, "If they are for the same *acts or facts* involved in the criminal information."

By careful examnation of the information and bill for injunction, it will be found, they both contain the same charges and allegations. They both relate to the same sales of liquor on the same dates to the same persons, and under like circumstances.

It was urged in this case as a reason for not allowing such effect to the judgment, that the acquittal in the criminal

case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that on the same evidence on the question of preponderance of proof, there might be a verdict for the United States, in the suit in rem; nevertheless, the Court held "the *fact or act* has been put in issue and determined against the United States and all that is imposed by the Statute, as a consequence of guilt, is a punishment; therefore, there could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing with a difference only in the consequences following judgment against defendants."

The Court concluded by saying, "The doctrine is peculiarly applicable to a case like the present where, in both proceedings, criminal and civil, the United States is the party on one side, and this claimant the party on the other. The judgment of acquittal in the criminal proceedings ascertained that the facts which were the basis of that proceeding, are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once and for all, between the United States and claimant in the Criminal Proceedings so that the facts cannot again be litigated between them, as the basis of any statutory punishment denounces as a consequence of the existence of the facts. .

The decision in this case was put on the grounds that the defendant could not be twice punished for the same crime and that the former conviction and judgment were a bar to the suit for the penalty.

POINT TWO

It may be said that the case of *State* v. *Roach*, 83 Kansas 606, is at variance with the Coffey Case. In that is was held in an action by the State to enjoin the maintenance of a place where intoxicating liquors are unlaw-

fully sold, it is error to render judgment for the defendant upon the ground that under the same evidence he had already been acquitted of a criminal charge of maintaining such a place. The Court then proceeds to point out why. Distinguishing the Coffey Case on two grounds:

First: The Coffey Case holds "The facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts.

Second: Because the degree of proof is different in the criminal and civil cases.

As to Point No. 1, Statutory punishment. Jurisdiction to padlock is by virtue of Statutory enactment. Jurisdiction to padlock is by virtue of Statutory authority, under Section 22, Title 2, of an Act of Congress, or there is no such right at all. There is no such right under State authority. See Case of *Hedden* v. *Hand*, 90 N. J. Eq. (C., E. & A. Case), page 5833.

In this case it was held "There existed no such right at Common Law, to abate a nuisance involving the commission of a crime, nor could such right be bestowed in a Court of Equity by legislative enactment.

The Court holding "That it is clear that if the Legislature may bestow on a Court of Chancery jurisdiction to grant an injunction and abate a public nuisance of a purely criminal nature, then there can be no valid argument against the power of the Legislature to confine the entire criminal code of this State to a Court of Equity for enforcement. It is apparent that a Court would render nugatory, the provisions of the Constitution which guarantees the right of a presentment of a Grand Jury and a trial by Jury to one accused of crime." And even the right of the Government to do so seems to be challenged in *U. S.* v. *Lot*, Vol. 296 Fed. Reports, 729.

Then the question naturally presents itself, is it statutory punishment? Does not the statute provide (Section 22) upon the judgment of the Court ordering such nuisance to be abated the Court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter.

Is this not statutory punishment?

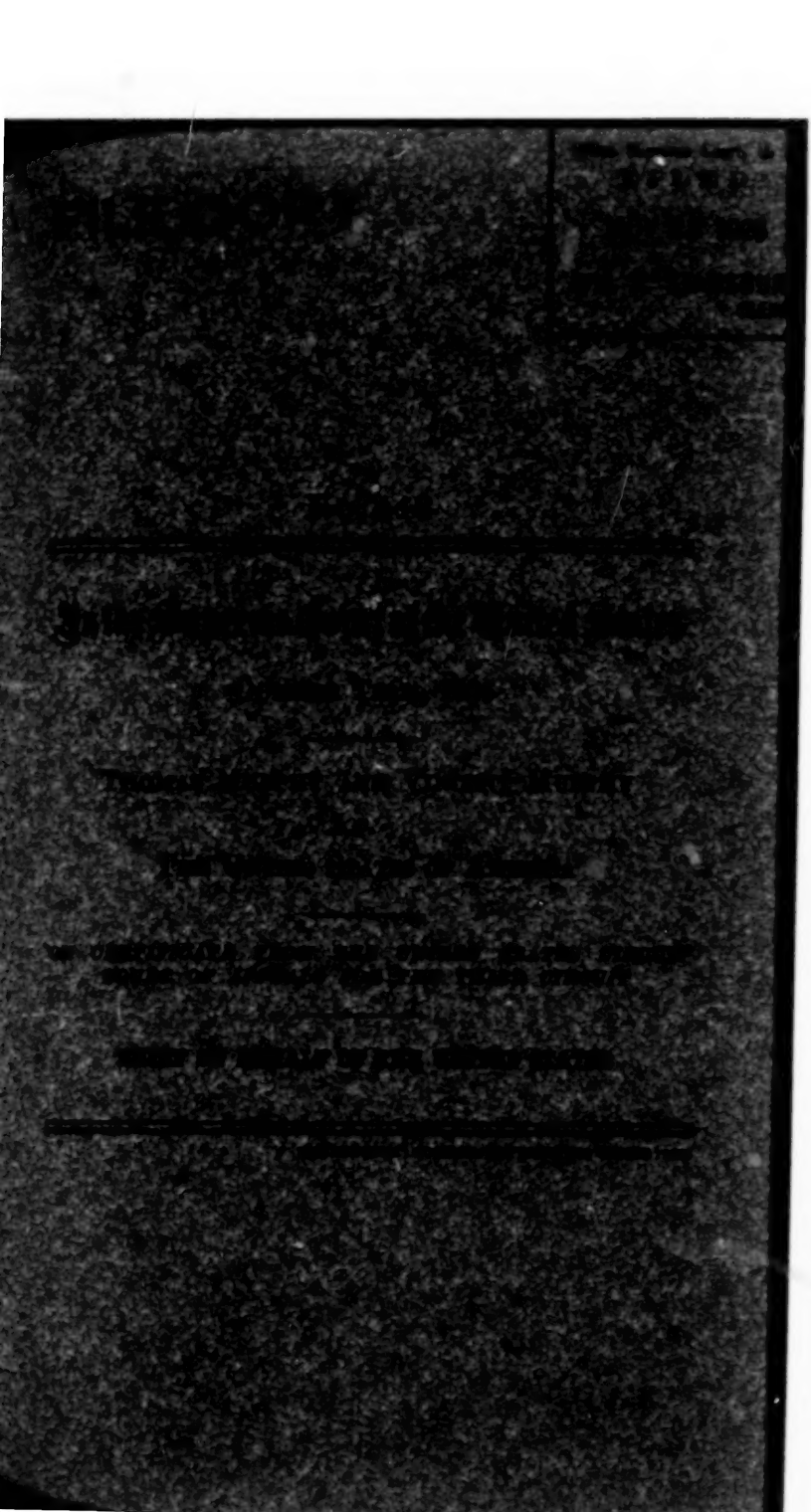
What difference does it make to me in effect whether I be punished by a fine, or whether I be deprived of the use of a valuable building for one year. Are they not both a pecuniary loss to me and the effect the same, whether I lose, say, five hundred dollars by a fine, or probably two thousand dollars, by way of taking my property away from me for one year. The effect is the same.

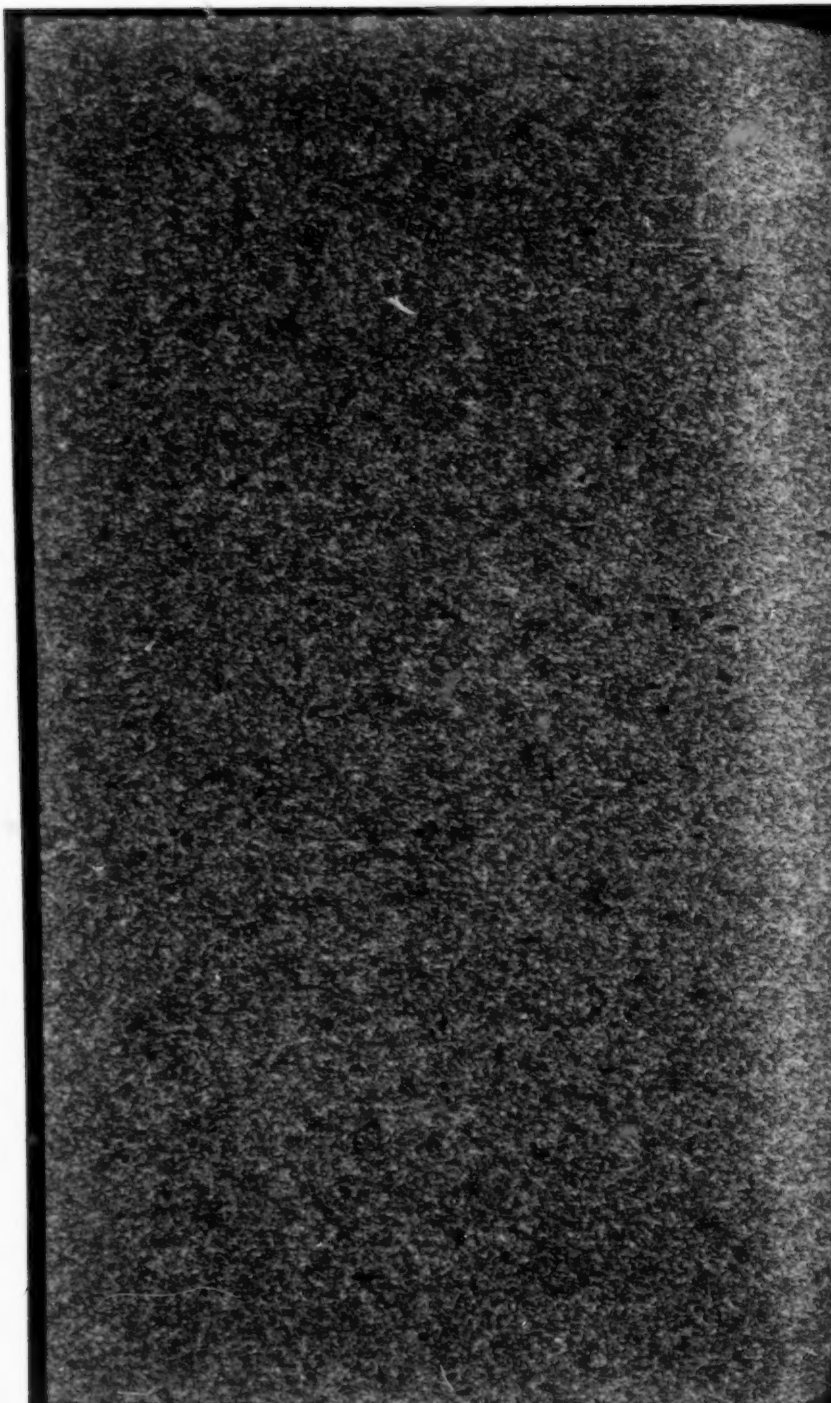
In the criminal proceedings the court has the power, if the defendants had been convicted of maintaining a nuisance, of fining and imprisoning the defendants. In the civil case, on the same charge the court if it found the defendants guilty of maintaining a nuisance, could deprive them of the use of their property for one year. Two punishments growing out of the same offense. The offense for which defendants had already been acquitted on in an issue raised by the Government.

Point 2 relates to the degree of proof required as before set forth. The Coffey Case fully disposes of that case as already herein set forth. That is the fact or act has already been passed on; and found against the Government. The Government is thereby and thereafter estopped in raising the same issue between same parties in any future proceedings, whether civil or criminal.

Respectfully submitted,

THOMAS MURPHY,
VINCENT MURPHY.





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BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Third Circuit. The decision of the District Court has not been reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts in this case are set out in the certificate, pages 1 and 2, as follows:

On a criminal information filed by the United States in the District Court for the District of New Jersey, charging a violation of Section 21 of Title II of the National Prohibition Act by the maintenance of a nuisance upon their premises, Thomas Murphy and Vincent Murphy were tried and acquitted. Thereafter, the United States, under authority of Section 22 of Title II of of the National Prohibition Act, filed a bill in equity in the same court against the same defendants, charging them upon the same facts with maintaining the same nuisance and praying that they be enjoined from using the premises as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of the Act and that the marshal be commanded to abate the nuisance by taking possession of all property used in connection therewith.

Early in the trial the defendants offered in evidence the record of their trial and acquittal in the criminal proceeding. It was admitted. At the end of the trial the defendants moved that the bill be dismissed on the ground that, as the records of the two proceedings showed identity of subjects matter and parties, the judgment of acquittal in the criminal proceeding is a bar to the civil suit, relying upon the law of *United States* v. *Coffey,* 116 U. S. 436. The motion was opposed by the United States upon authority of *United States* v. *Stone,* 167 U. S. 178, and *Chantangco* v. *Abaroa,* 218 U. S. 476, and upon the reasoning of *State* v. *Roach,* 83 Kas.

606, 112 Pac. 150, 31 L. R. A. (N. S.) 670. The court refused the motion and entered a decree abating the nuisance and enjoining the defendants from occupying or using the premises for one year. The defendants appealed.

The Circuit Court of Appeals for the Third Circuit then certified the following question:

QUESTION CERTIFIED

> Is a judgment of acquittal on a criminal charge of maintaining a common nuisance in violation of Section 21, Title II of the National Prohibition Act a bar to a civil action brought under Section 22, Title II of the Act against the same parties to abate the same alleged nuisance?

SUMMARY OF ARGUMENT

The question certified by the Circuit Court of Appeals should be answered in the negative. The case defendants rely on as contrary to the Government's theory is *Coffey* v. *United States*, 116 U. S. 436. However, in view of the opinion of this Court in *Stone* v. *United States*, 167 U. S. 178, the *Coffey case* may be readily distinguished. *Chantangco* v. *Abaroa*, 218 U. S. 476, supports the Government's position, and *State* v. *Roach*, 83 Kan. 606, coming from the Supreme Court of Kansas, decides the precise question here presented in accordance with the Government's contention.

The object of Section 21 is punishment of the offense of maintaining a nuisance. The object of

Section 22 is to abate the nuisance in accordance with the usual equitable remedies. The case, therefore, falls squarely within the rule announced by this Court in the *Stone* and *Chantangco cases* to the effect that an acquittal in a criminal case does not bar a civil action between the same parties, even though based upon the same facts. That this is correct is shown not only by an analysis of the National Prohibition Act but by the legislative history of that Act.

There is no merit to the contention that an acquittal in a criminal case is res judicata in a subsequent equity proceeding. It does not constitute an estoppel by judgment, since the former requires proof beyond a reasonable doubt and the latter merely a preponderance of the evidence. It is not an estoppel by verdict, since the causes of action differ in their essential elements and purposes. Neither is there merit in the contention that the trial in equity is barred by a prior acquittal in a criminal case based on the same facts on the ground of double jeopardy, because abatement of a nuisance is not punishment.

ARGUMENT

I

DECISIONS REFERRED TO BY THE CIRCUIT COURT OF APPEALS

Before developing the Government's main argument it would seem advisable at the very threshold

to dispose of the four cases which have proved troublesome to the court below. One of these cases, *Coffey* v. *United States,* 116 U. S. 436, at first blush seems contrary to the Government's contention, but upon analysis is shown to be readily distinguishable. Two others, *Stone* v. *United States,* 167 U. S. 178, and *Chantangco* v. *Abaroa,* 218 U. S. 476, announce principles which are in accord with the Government's theory. The fourth case, *State* v. *Roach,* 83 Kansas 606, coming from the Supreme Court of Kansas, is exactly in point and supports that theory.

The Coffey case:

Defendants relied upon the decision of this Court in *Coffey* v. *United States, supra,* wherein the Government had filed a libel against certain personal property, claiming forfeiture thereof to the United States on account of the violation of certain statutes. The libel contained three counts, based, respectively, on Sections 3257, 3450, and 3453 of the Revised Statutes.

Section 3257 of the Revised Statutes provides:

> Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him * * * he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits * * * found in the distillery and on the distillery premises, and shall be fined * * * and be imprisoned. * * *

Section 3450 of the Revised Statutes provides:

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities * * * shall be forfeited; * * * And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. * * *

Section 3453 of the Revised Statutes provides:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, * * * may be seized by the Collector or Deputy Collector of the proper district * * * and shall be forfeited to the United States. * * * and all tools, implements, instruments, and personal property whatsoever, in the place or building, * * * where such articles * * * are found, may also be seized by any Collector or Deputy Collector as aforesaid, and shall be forfeited as aforesaid. The proceedings to

> enforce such forfeiture shall be in the nature of a proceeding *in rem* in the Circuit Court or District Court of the United States for the District where such seizure is made.

Previously Coffey had been tried and acquitted under a criminal charge based upon a violation of the above sections of the Revised Statutes, as well as upon charges of violation of Sections 3256, 3296, and 3452 of the Revised Statutes. To the suit *in rem* Coffey pleaded that the judgment of acquittal in the criminal case constituted a bar. There was no question on the record that the fraudulent acts, attempts and intents to defraud, alleged in the prior criminal information and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts, and intents averred in the information *in rem*.

This Court found that the previous acquittal constituted a bar to the proceeding *in rem*. The *ratio decidendi* of the Court's decision is as follows (pp. 442–445):

> It is true that Section 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific *property shall be forfeited;* and (2) that the *offender shall be fined* and imprisoned. * * * It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place be-

> cause of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; *and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor.* There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.
>
> * * * * *
>
> The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts can n be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. (Italics ours.)

The Government contends that the decision in that case is not applicable to the instant case because (1) Section 22 of the National Prohibition Act, in authorizing a decree in abatement, does not have for its purpose the infliction of a punishment,

and (2) whatever may be the result to the owners of the premises of the closing order which sometimes may, and in this case did, follow the decree of abatement of the nuisance, it is merely incidental to enforcing the decree in abatement, and protecting the public in aggravated cases from future dangers from the nuisance.

The Stone case:

On the authority of the *Stone, Chantangco,* and *Roach cases* the Government resisted defendants' motion that the judgment of acquittal in the criminal case under Section 21 of the National Prohibition Act constituted a bar to the equity case pending under Section 22 of the National Prohibition Act.

In *Stone* v. *United States, supra,* the United States brought an action against Stone and others to recover the reasonable value of certain railroad ties alleged to have been manufactured from trees unlawfully cut from the public lands of the United States in the State of Idaho and unlawfully converted by the defendants to their own use. Stone answered separately and alleged that he had been indicted, tried, and acquitted upon a charge of getting timber unlawfully from the same lands. This acquittal he pleaded as a bar to plaintiff's civil action for conversion. The indictment had been based upon Section 2461 of the Revised Statutes which provides that "If any person shall cut, or cause or procure to be cut, or * * * remove, or cause or procure to be removed, or aid, or assist,

or be employed" in cutting or removing certain timber in certain reserves he "shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months." This Court held that an acquittal on the criminal charge did not prove or disprove any material fact involved in the civil action for damages, and that the result sought by the latter was not punishment. The *Coffey case* was carefully reviewed and distinguished and its application limited to suits for forfeitures and penalties on the grounds that such suits, (*a*) although civil in form are penal in nature, (*b*) grow out of penal statutes, and (*c*) seek to impose a punishment laid by a criminal statute as a result of criminal acts. Reasoning further this Court said (p. 188) that "In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action * * * might have been sufficient to entitle the Government to a verdict" and concluded that "this action is unlike that against *Coffey* because this is not a suit to recover a penalty, impose a punishment, or to declare a forfeiture."

Thus the *Stone* decision establishes the kind of cases in which the *Coffey case* may be applied. Clearly the instant case is not one of them. The order abating a nuisance under Section 22, Title

II, of the National Prohibition Act, and when deemed necessary the further exercise of the powers of the court of equity to enforce compliance with its decree in abatement by closing the premises involved, is not the imposition of a statutory punishment, penalty, or forfeiture.

The Chantangco case:

This was an action between private parties to recover damages for the destruction of a storehouse and stock of merchandise alleged to have been burned maliciously and unlawfully by defendant Abaroa. The complaint was specifically grounded upon criminal act and intent, and not upon any fault or negligence. The cause of action therefor arose under Article 17 of the Penal Code of the Philippines, providing, "Every person criminally liable for a crime or misdemeanor is also civilly liable," and Section 1092 of the Civil Code of the Philippine Islands directing that civil obligations arising out of crime shall be governed by the penal code.

A defense was interposed that Abaroa had been acquitted in a criminal action for the same burning and that in consequence of such judgment of acquittal he was not liable in a civil action for damage to plaintiff, based upon malicious or unlawful acts.

This Court held that civil liability based upon an obligation arising from the commission of a crime,

and not upon negligence, could not be enforced without a prior legal determination of the fact of guilt or crime. The case therefore turned in this Court upon a consideration of the local statutes which brought it within the principles of *Coffey* v. *United States*, rather than of *Stone* v. *United States*, on the theory that the indemnification for damages here sought was a *part of the punishment* attached to the offense of which Abaroa had been acquitted.

The Government maintains that this case is a further affirmance and illustration of the limited application of the *Coffey case* to quasi criminal suits whose purpose is to inflict the balance of a punishment imposed in addition to fine and imprisonment by a criminal statute for the commission of a criminal offense.

This Court in the *Chantangco case* reviewed the rule that a judgment in a criminal proceeding can not be read in evidence in a civil action to establish any fact there to be determined for the reasons (*a*) that usually the parties are not the same; (*b*) that different rules of evidence are applicable; and (*c*) that even where there is identity of parties there must also be identity of purpose of the proceeding.

The doctrines just announced apply with full force to the instant case. The cause of action in the *Chantangco case* was for damages growing out of the commission of crime. It is clear under

Article 17 of the Penal Code of the Philippines that the civil liability is but an added punishment for the commission of the crime. No such association of criminal and civil liability exists under Sections 21 and 22 of the National Prohibition Act. In fact, Section 22 does not involve any element of liability either civil or penal. It only lays upon the court the duty in certain cases of imposing a limitation upon the future use of property, there being no liability for its illegal use save responsibility to the court for a disobedience to its decree. This clearly is not a liability of any kind arising from crime.

The Roach case:

Here the Supreme Court of the State of Kansas had before it exactly the same question as is now certified to this Court. Roach was charged with keeping a place where intoxicating liquors were unlawfully sold, and was acquitted of the criminal charge by the verdict of a jury. An action in equity to enjoin the maintenance of the same place as a common nuisance was submitted to the Court *upon the same evidence*. Judgment was rendered for the defendant upon the ground that the acquittal constituted an adjudication of the controversy involved in the civil case.

After reviewing the *Coffey* and *Stone* decisions of this Court, and decisions in point from the highest courts of Vermont, Texas, Michigan, New York,

Iowa, and New Hampshire,[1] the Supreme Court of Kansas reversed the trial court in sustaining prior acquittal as a plea in bar, on the ground that the rule of the *Coffey case*, as clarified by the opinion in the *Stone case*, did not apply to injunction suits, but only to proceedings for a penalty or forfeiture, and that state courts have taken the view that "Acquittal in a criminal action is not a bar to a subsequent civil proceeding founded on the same facts. That is the general rule * * *" (p. 609).

The observations of the Supreme Court of Kansas on the *nature* and *purpose* of injunction proceedings to abate liquor nuisances forcefully apply here. The identical situation is presented. The facts and the law are the same. There the court said (p. 612):

> The purpose of the injunction action against the defendants is *not to punish* them for having violated the law, but to place them under an added obligation *to refrain* from its violation *in the future*. It is a civil, not a criminal or even a quasi criminal, proceeding. The State is entitled to its judgment if it establishes its case by a preponderance of the evidence. The acquittal

[1] *Riker* v. *Hooper*, 35 Vt. 457; *State* v. *Adams*, 72 Vt. 253; *State* v. *Sargood*, 80 Vt. 415; *Busby* v. *State*, 51 Tex. Crim. Rep. 289; *Micks* v. *Mason*, 145 Mich. 212; *People* v. *Snyder*, 90 N. Y. Sup. Ct. App. Div. 422; *People* v. *Rohrs*, 56 N. Y. Sup. Ct. (49 Hun) 150; *Iowa* v. *Meek*, 112 Iowa, 338; *Iowa* v. *Cobb*, 123 Iowa 626; *State* v. *Corron*, 73 N. H. 434.

in the criminal action is therefore not a bar. (Italics ours.)

The criminal action in the Kansas court was based upon Kansas General Statutes, 1909, Section 4387. The action in equity was based upon Section 4388. Attention is invited to the fact that Section 4387 of the Kansas Statutes is strikingly similar to Section 21, Title II, of the National Prohibition Act, both in its definition of a nuisance and in the manner and extent of punishment for violation thereof. The words of these two statutes are almost alike. The abatement of a nuisance in a Kansas court of equity under Section 4388 is the same as the abatement of a nuisance under Section 22, Title II, of the National Prohibition Act. The Kansas Statutes further provide (Section 4389) that upon a showing that such an injunction is being violated the court may command the enforcement of such injunction by such measures and means as it may deem necessary to prevent further violation. This is an inherent power of equity courts recognized and left unabridged by the Kansas Statutes. The same power in the Federal courts of equity is restricted by the National Prohibition Act to a closing of the premises for a period not to exceed one year. Whether restricted or not, the exercise of that power in either case is a means of enforcing the court's decree—only that and nothing more.

The Government contends in the instant case that the purpose of the closing of the premises after a decree in abatement under Section 22, National Prohibition Act, is, like closing premises under the Kansas liquor statutes, not punishment, but to insure that the abatement will be effective in the future.

II

IN THE NATIONAL PROHIBITION ACT CONGRESS INTENDED TO DISASSOCIATE ENTIRELY THE ABATEMENT OF A NUISANCE FROM THE PUNISHMENT IMPOSED FOR THE CRIMINAL OFFENSE OF MAINTAINING A NUISANCE

The portions of the National Prohibition Act out of which this case arises reveal a different legislative purpose from that of the statutes involved in the *Coffey case.*

Sections 21 and 22, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 314), provide:

> SEC. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or

place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond

shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Both the above sections deal with violations of the liquor laws, habitual in character, and of fixed abode in the community, but the theories upon which the two sections are based are widely divergent. Both means of dealing with such evils are

well known to the common law. See *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91.

Section 21 seeks to punish criminally the person responsible for the public offense of keeping a nuisance. That he is the one responsible for its maintenance must be established beyond a reasonable doubt. Punishment is restricted to a fine of $1,000 or a year's imprisonment, or both. The court is powerless in an action for violation of Section 21 to abate the nuisance, dispose of the liquor, or saloon paraphernalia. The way Section 21 stops short, with only the usual steps of a criminal prosecution, is in contrast with such statutes as those involved in the *Coffee case* and Section 26 of the National Prohibition Act, where Congress added forfeiture of the agency of law violation as a secondary punishment for the commission of the prohibited act. Undoubtedly a proceeding *in rem* to forfeit the car under Section 26 would fail if the driver had been acquitted. In such cases conviction is jurisdictional to the court's right to dispose of the article declared forfeited.

Section 22 directed to abatement of a nuisance provides a remedy, separate and distinct from Section 21. It is solely protective in purpose. Its object is not to punish. Whatever inconvenience or hardship may ultimately fall upon anyone as a result of its operation is purely incidental to its primary object of summary relief for an endangered community.

Section 22 discloses this intent of Congress to protect, not to punish, in several ways.

In the first place, two provisions are mandatory. If it is made to appear to the satisfaction of the court by affidavits before hearing that the nuisance exists, then "a temporary writ of injunction shall forthwith issue." This temporary restraining order is not to stay the arm of one who has committed a crime. It may be only to restrain the defendant from "*permitting* the continuance" of the condition. Later, after hearing on the merits, if the court finds the material allegations of the complaint true "the court *shall* order that no liquors shall be manufactured, sold, bartered, or stored." Congress thus puts upon the court two mandatory duties:

> (*a*) Quick action to relieve the community before hearing can be reached; and
>
> (*b*) After trial of facts an immediate order of abatement.

Certainly it can not be contended that up to this point there is the slightest suggestion of penalty, punishment, or forfeiture. Nor does the fact that Section 22 goes further and *permits* the court to—the word is "*may*"—order the place closed for a year or execute a bond guaranteeing its lawful use, put a different face upon the matter. This auxiliary permission to the court to use discretion to adapt its decree to the circumstances of each particular case and make it severe enough to insure obedience is necessary to give effective and just operatiton to the court's original order.

Likewise, the court may, under Section 22, in its discretion, permit the premises to be reoccupied upon the giving of a bond conditioned as prescribed by the statute. Such action by the court is not a mitigation of punishment. It is a manifestation of its belief that thereafter the restraining order alone will be effective.

As stated by this Court in *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 40:

> If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that *all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic.* (Italics ours.)

In the second place, evidence that abatement of a nuisance is not in the nature of punishment is to be found in the provision in Section 22 permitting state officials to institute abatement proceedings in state courts. It is fundamental that penal statutes of one sovereign can not be enforced in the courts of another sovereign. *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 290; *Huntington* v. *Attrill*, 146 U. S. 657, 672. In so providing, therefore, Congress manifestly had in mind the purely

equitable remedies relating to public nuisances. These remedies are in nowise punitive.

It is a well-recognized rule that relief of society from an offending condition is the purpose of statutes providing for abatement of nuisances. See *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 567. It is equally well established that the court may, without infringing constitutional rights, adopt whatever means are reasonably *necessary* to abate such nuisances even to the extent of taking or destroying the property of an innocent owner. *Mugler* v. *Kansas*, 123 U. S. 623; *Lawton* v. *Steel*, 152 U. S. 133; *Northwestern Laundry Co.* v. *Des Moines*, 239 U. S. 486; *Sings* v. *Joliet*, 237 Ill. 300; *Polsgrove* v. *Moss*, 154 Ky. 408; *Carleton* v. *Rugg*, 149 Mass. 550.

As stated by the court in *United States* v. *Boyaton* (E. D. Mich), 297 Fed. 261, 267:

> Obviously the permitted closing of a place which has been used for the maintenance of a nuisance, as part of the provided procedure for the abatement of such nuisance, was not intended as a punishment nor penalty for previous fault, but merely as a helpful and reasonable aid in abating the nuisance. It is clear that such a remedy, accompanied and safeguarded as it is by the discretionary power in the court to apply and adapt it to the circumstances of each particular case, is both effective and just. It is a matter of common knowledge, of which this court will take judicial note, that

the existence of a nuisance of this kind involves, not only the presence of intoxicating liquor, but also the habitual presence of those who come to the premises to sell and to purchase such liquor, and who necessarily assist, and participate in, the continued maintenance of such nuisance. The usual, if not inevitable, result is that the place acquires that "probability that the old customers will resort to the old place," which the law recognizes, in connection with a lawful business, as "good will." The good will of a reputable business is valued throughout the business world. Purchasers pay thousands of dollars for this element of a legitimate business, knowing that the habits of customers in patronizing a particular institution become so fixed as to greatly enhance its value. So, when a place becomes a public nuisance because intoxicating liquor is there purchased, kept, and sold for beverage purposes, it establishes a reputation and acquires customers who will continue to frequent that location. This naturally and necessarily renders it unusually difficult to prevent further violations of the law in that place, with consequent continuation of the nuisance. It is not to be expected that an owner of premises who has already failed to prevent its use as a public nuisance will be more successful in that respect in the future, notwithstanding the entire innocence and good faith of such owner. It often

> happens, as is perhaps true in the present case, that an owner or lessor of premises on which such a nuisance has been created (by the occupant thereof) is not personally responsible for that situation and has not contributed to, nor even had knowledge of, the acts constituting the nuisance. So that under those circumstances, and specifically in the present case, the closing of the premises is not to be considered as a reflection, in any way, upon such owner or lessor. It is not prompted by fault nor designed as punishment, but its sole purpose is to accomplish an effectual abatement of the nuisance. As already indicated, I can not doubt that such action is a reasonable and appropriate, if not absolutely necessary, means of enforcing the constitutional power to abate a public nuisance.

Finally, a review of the legislative history of the National Prohibition Act also indicates that it was the intent of Congress to leave the abatement proceedings entirely independent of and separate from the criminal proceedings under Section 21. Section 24 of the bill (H. R. 6810), which afterwards became the National Prohibition Act, contained the following (Congressional Record, Vol. 58, Part 3, p. 2895):

> That when it appears in any criminal proceeding that any common nuisance as defined herein exists it shall be the duty of any officer authorized to enforce this Act to pro-

> ceed promptly in a court of equity to abate such nuisance, and the final conviction of the defendant in such trial shall be conclusive evidence against such defendant of the facts adjudged therein as to the existence of the nuisance.

This provision was severely criticized when the bill came before the House in a Committee of the Whole. (Congressional Record, Vol. 58, Part 3, p. 2896.) One of the objections was that this legislation precluded the defendant from offering other evidence in the equity case than might have been available to him in the criminal case. Subsequently Section 24 appeared as a part of Section 23 and the provision making it the duty of the district attorney to proceed in equity and declaring the judgment in the criminal case conclusive was stricken from the bill by the Senate Judiciary Committee. (Congressional Record, Vol. 58, Part 5, p. 4838.) Had Congress intended that the proceedings in equity be interlocked with those in the criminal action under Section 21, it is reasonable to suppose they would not have stricken the above portion of the bill. That they have omitted this provision from the bill as finally enacted supports the conclusion that Congress intended the remedy by injunction to be distinct from the criminal proceedings; that the decree in abatement should form no part of the punishment for a violation of Section 21; and that the outcome of the criminal case

should not adjudicate the issue as to the existence of the nuisance *vel. non.*

III

PRIOR ACQUITTAL OF DEFENDANT DOES NOT CONSTITUTE A BAR TO ABATEMENT PROCEEDINGS BASED ON THE SAME FACTS

Defendants urge that a judgment of acquittal on a criminal charge of maintaining a common nuisance is a bar to abatement proceedings to remove the same alleged nuisance. But they do not divulge upon what grounds it constitutes a bar. Is acquittal of defendants res adjudicata in the civil proceedings? We do not think so. There is no estoppel "by judgment" because the causes of action are not the same, one being civil, the other criminal. *Re Smith,* 10 Wend. (N. Y.), 449; *State* v. *Knapp,* 178 Iowa 25, 28; *People* v. *Gifford,* 54 Calif. App. 182, 184; *Youmans* v. *City of Osawatomie,* 118 Kan. 767, 770; *State* v. *Lewis,* 164 Wis. 363, 366; *State* v. *Small,* 319 Ill. 437, 446.

Different degrees of proof are required. *People* v. *Snyder,* 90 N. Y. App. Div. 422, 424; *Ellison* v. *Louisville,* 17 Ky. L. Rep. 593, 594; *United States* v. *Donaldson-Shultz Co.* (C. C. A. 4th), 148 Fed. 581.

It is not estoppel "by verdict" which results where the causes of action differ, but there is an issue common to both cases, which has been liti-

gated and decided in one case and therefore can not be retried in the other. The issue tried in the criminal case is not a material fact to be determined in the abatement proceedings. The real issue before the jury in the criminal case was whether the Murphys were *guilty of maintaining* a nuisance. That meant that they had to have knowingly, and with a will to evade the law, sold, kept, bartered, or manufactured intoxicating liquors on the premises in question, or procured others to do so for them. The jury had a reasonable doubt on this point and consequently returned a verdict of acquittal. That verdict may have indicated that the Government's evidence did not quite reach the standard necessary in criminal cases; it may have meant insufficient identification of these defendants with the actual handling of the liquors; it may have been because of lack of intent on their part to make the violations continuous; but in no sense did the jury's verdict decide the issue of *whether in fact a nuisance existed* at the premises in question, and that is exactly all the issue there is in the injunction case. In the latter, guilty intent of defendants is in no way material. Indeed, they may be quite free from blame in a criminal sense. The nuisance may consist of others bringing liquors to the premises for barter. The "reputation" of the *place* is material. It may have once had a nuisance conducted there and customers engaged in unlawful enterprises continue to frequent the location. The owner of the premises, not-

withstanding possibly his entire good faith, may fail to prevent its use as a public nuisance. As said in the *Boynton case, supra,* the power to padlock given to the court by Congress in plain and unambiguous language in Section 22 is not made dependent upon knowledge, notice, or guilty intent of the owner. The only issue, therefore, in a proceeding under Section 22 is, *does a public nuisance exist* on certain premises? Acquittal of the owner under Section 21 of maintaining it there decides no fact in issue in the abatement proceeding under Section 22. It only eliminates him as one of the agencies contributing to the maintenance of the nuisance.

Neither can defendants establish that the prior acquittal in the criminal case is a bar to civil proceedings on the ground of double jeopardy, because abating a nuisance is not imposing punishment. As has been plainly shown in Argument II, that is not the result of suits in abatement. It was not the intent of Congress as revealed by the terms of Section 22 and the legislative history of its enactment. Closing the premises is not the object of abatement proceedings. It is auxiliary thereto and done only in the discretion of the court as a necessary and proper precaution in certain circumstances to prevent continuance of the nuisance.

Finally, it is pertinent to add that if a decree under Section 22 could constitute double jeopardy in this case, then the rule would cut both ways, and likewise where the owner had been convicted under

Section 21 there could be no subsequent proceedings to abate the nuisance. Consequently Section 22 would become a nullity. The courts will not adopt such an unreasonable construction of an act of Congress. *Baltzell* v. *Mitchell*, 3 F. (2d) 428.

CONCLUSION

From the foregoing, it is submitted that the question certified to this Court from the Circuit Court of Appeals for the Third Circuit should be answered in the negative.

Respectfully,

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

NORMAN J. MORRISSON,
Senior Attorney.

NOVEMBER, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 443.—October Term, 1926.

Thomas Murphy and Vincent Murphy, *vs.* The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[December 6, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

Thomas Murphy and Vincent Murphy were tried for maintaining a nuisance in violation of Section 21, Title II of the National Prohibition Act, (October 28, 1919, c. 85; 41 St. 305, 314,) and were acquitted. Subsequently the United States brought a suit in equity to abate the same alleged nuisance under § 22 of the same Title. At the trial the defendants proved their former acquittal and moved that the bill be dismissed. The District Court denied the motion and entered a decree abating the nuisance and enjoining the defendants from occupying or using the premises for one year. The defendants appealed. The Circuit Court of Appeals certified to this Court the question whether the former acquittal is a bar.

By § 21 any room, house, or place where intoxicating liquor is manufactured, sold, or kept in violation of the statute is declared to be a common nuisance, and maintaining it is made a misdemeanor punishable by fine, imprisonment, or both. Then follows the section under which the defendants now are sued, authorizing a suit in equity for an injunction against the nuisance as defined. A temporary writ restraining the continuance of it until the conclusion of the trial is to be issued if it is made to appear to the satisfaction of the court or judge in vacation that such nuisance exists. It is not necessary for the court to find that the property was being unlawfully used at the time of the hearing, but on finding that the material allegations of the petition are true, the court 'shall order' that no liquors shall be manufactured, sold, or stored, &c., in the place; and upon judgment that the nuisance be abated, 'may

order' that the place shall not be occupied or used for one year thereafter, but may permit it to be occupied if the owner or occupant gives a bond for not less than $500 nor more than $1,000, that intoxicating liquor will not thereafter be manufactured, sold, or kept, &c., therein, &c.

The appellants say that an additional penalty is imposed by § 22, and that after they have been acquitted of the crime they cannot be punished for it in a second proceeding. *Caffey* v. *United States*, 116 U. S. 430. But although the contention is plausible it seems to us unsound. It is true, especially if the premises are closed for a year, that a pecuniary detriment is inflicted, but that is true of a tax, and sometimes it is hard to say how a given detriment imposed by the law shall be regarded. *Hodge* v. *Muscatine County*, 196 U. S. 276, 279, 280. *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348. *The Creole*, 2 Wall. Jr. 485. The mere fact that it is imposed in consequence of a crime is not conclusive. A government may endeavor to prevent certain facts and yet provide that if they happen they shall yield as much revenue as they might have yielded if lawful. *United States* v. *One Ford Coupe Automobile*, November 22, 1926. In like manner it may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime. The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. This seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result. The imperative words go only to the immediate stopping of what is clearly a nuisance. The permissive words allow closing for a year (a not unreasonable time to secure a stoppage of the unlawful use, *United States* v. *Boynton*, 297 Fed. Rep. 261, 267,) and show the purpose of that by providing the alternative of a bond conditioned against such uses.

If we are right as to the purpose of § 22 the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar. For although the parties to the two cases are the same, the judgment in the criminal case does not make the

issues in the present one *res judicata*, as is sufficiently explained in *Stone* v. *United States*, 167 U. S. 178 and *Chantangco* v. *Abaroa*, 218 U. S. 476. The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place. Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a carefully considered case, *State* v. *Roach*, 83 Kan. 606.

Answer: No.

A true copy.

Test:

Clerk, Supreme Court. U. S.